ABD. KHALID BIN ABD. HAMID

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
PUAN ZALEHA ZAHARI JC
[CRIMINAL APPEAL NO. 42-46-91]
19 OCTOBER 1994

CRIMINAL LAW: *Charge of abetment of corruptly receiving gratification - Whether prime facie case made out - Whether mens rea proved - Whether essential for prosecution to prove that principal offender had the ability to perform the act stipulated in charge - Meaning of "solicit" - s. 3(a) (ii) Prevention of Corruption Act 1961.*

EVIDENCE : *Evidence tending to show that accused was guilty of other crime - Whether prejudicial - Whether admissible.*

EVIDENCE : *Evidence of co-accused - Whether to be admitted - Whether amounted to confession - Whether corroboration needed for co-accused's evidence - s. 30 Evidence Act 1950.*

WORDS & PHRASES: *"solicit" - Section 3(a)(ii) Prevention of Corruption Act 1961.*

The appellant was charged and convicted for abetting one Paramadas a/l Saminathan who was charged, convicted and sentenced of corruptly receiving gratification of RM1,300 as a reward for an official of the Ministry of Finance under s. 3(a) (ii) of the Prevention of Corruption Act, 1961. The appellant was sentenced to 10 months' imprisonment and fined RM7,000 in default 6 months' imprisonment. He appealed against conviction and sentence on the ground that the prosecution had failed to prove that the person abetted (the co-accused) had the ability to perform the act repesented as stated in the charge. The other grounds of appeal, *inter alia*, were that similar fact evidence was wrongly admitted, that circumstantial evidence did not prove *mens rea* and that the co-accused's evidence needed corroboration.

Held:

[1] It is not necessary for the prosecution to prove that the person abetted had the power to do the act represented. It is sufficient that the representation is made. Solicitation and payment had also been proved in this case.

[2] The similar fact evidence is relevant and probative and its probative value outweighs its prejudicial effect. It throws light on the probabilities of the case and forms a further link in the chain of proof.

[3] It is difficult, if not imposible to prove intention by direct evidence. Nonetheless, in the present case, the combined strength of the strands of circumstantial evidence ,when twisted together, point irreristably to the appellant's guilt.

[4] The co-accused giving evidence on his own behalf is not regarded as an accomplice giving evidence for the prosecution and therefore the rule regarding corroboration did not apply.

[Appeal dismissed]

Cases referred to:
PP v. You Kong Lai [1985] 1 MLJ 298 ***(foll)***
Junaidi bin Abdullah v. PP [1993] 4 CLJ 201 ***(foll)***
PP v. Ong Kok Tan [1969] 1 MLJ 118 ***(foll)***
Daud bin Awang Ngah & Ors. v. Public Prosecutor [1938] 24 MLJ 168 ***(foll)***
Khoo Hi Chiang v. Public Prosecutor [1994] 1 AMR 6 ***(refd)***
Makin v. Attorney General for New South Wales [1984] AC 57 ***(foll)***
G.F.L. Ewin v. Public Prosecutor [1949] 15 MLJ 279 ***(foll)***
Boardman v. Director of Public Prosecutor [1974] 3 AER 887 ***(foll)***
Anandagoda v. The Queen [1962] 28 MLJ 289 ***(foll)***
The King v. Cooray [1926] 27 NLR 74 at 79 ***(refd)***
Tan Cheng Seng & Anor. v. Rex [1948] MLJ 148 ***(foll)***

Legislation referred to:
Prevention of Corruption Act 1961, ss. 3, 3(a) (ii) & 15
Penal Code, ss. 107, 108, 109 & 161
Evidence Act 1950, ss. 11, 14 & 15

For the appellant - Jahaberdeen b. Md. Yunus & Mohd. Shafee Abdullah; M/s. Shafee & Co.
For the respondent - Masri b. Mohd. Daud, DPP.

JUDGMENT

Zaleha Zahari JC:

One Paramadas a/l Saminathan, (the 2nd accused in the Court below) a clerk attached to the Department of Inland Revenue was convicted on a charge of corruptly receiving gratification of cash RM1,300 as a reward for officials of the Ministry of Finance in contravention of s. 3(a) (ii) of the Prevention of Corruption Act 1961 and sentenced to 10 months imprisonment and fined RM5,000 in default 4 months imprisonment. He has not appealed.

The appellant, a public officer serving in the Ministry of Finance, was charged and convicted of abetting Paramadas under s. 3(a) (ii) Prevention of Corruption Act 1961 read in conjunction with s. 109 Penal Code. The appellant was sentenced to 10 months imprisonment and fined RM7,000 in default 6 months imprisonment by the learned Sessions Court Judge on 24 September 1991. The amended charge upon which he was found guilty and convicted is as follows:

> That on or about 5 March 1988, at about 9.20 a.m. at the office of Sicura Promotions Sdn. Bhd., No.40A, Jalan Jejaka 9, Taman Maluri, Cheras, in the Federal Territory of Kuala Lumpur, one Paramadas a/l Saminathan committed an offence under s. 3(a) (ii) of the Prevention of Corruption Act, 1961 - (Revised 1971), to wit, did corruptly receive for himself a gratification, to wit, cash RM1,300 from one Kua Chung Sen, as a reward for members of a public body, to wit, officials of Kementerian Kewangan, Malaysia, Kuala Lumpur, for doing something in respect of a certain matter, to wit, for having obtained an approval letter dated 13 February 1988 for registration of Evergreen Horticulture Nursery & Trading Company with the Kementerian Kewangan, Malaysia, Kuala Lumpur as a contractor for supply/service in which the said public body is concerned and that you between the months of February and March 1988, at Bahagian Pengurusan Kontrak and Bekalan, Kementerian Kewangan, Tingkat 4, Blok 9, Jalan Duta, Kuala Lumpur, abetted the said Paramadas a/l Saminathan the commission of the aforesaid offence which was committed in consequence of your abetment and that you have thereby committed an offence punishable under s. 3(a) (ii) of the Prevention of Corruption Act 1961 and read with s. 109 of the Penal Code.

Paragraph 3 of the petition of appeal lists out 7 grounds which briefly may be summarised as follows:

(a) Insufficient evidence to prove ingredients of offence;

(b) Insufficient evidence to show mens rea on part of the appellant;

(c) Wrongful admission of Exhibit P17 and P20;

(d) Wrongful admission of statement of co-accused which is not corroborated in material particulars;

(e) Wrongful admission of confession of co-accused;

(f) Wrongful acceptance of evidence of a co-accused which are contradictory and inconsistent;

(g) Rejection of defence which has raised a reasonable doubt.

Whether a prima facie case made out?

The cumulative effect of grounds (a) - (f) alleged that a *prima facie* case had not been made out on an application of the maximum evaluation test as set by the pronouncement of the Supreme Court in *Khoo Hi Chiang v. Public Prosecutor* [1994] 1 AMR 6; that the appellant should have been acquitted and discharged without his defence being called.

The first ground that calls for determination is what ingredients must the prosecution prove to establish a *prima facie* case in a prosecution on a charge under s. 3(a) (ii) Prevention of Corruption Act 1961.

The key words of s. 3(a) (ii) in the context of the present case are:

> 3. Any person who shall by himself or by or in conjunction with any other person -
>
> (a) corruptly solicit or receive or agree to receive for himself or for any other persons; or
>
> (b) ...
>
> any gratification as an inducement to or reward for, or on account of:
>
> (i) ...
>
> (ii) any member, officer or servant of a public body doing ... anything in which the public body is concerned,
>
> shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding the thousand dollars or to imprisonment for a term not exceeding five years or to both.

The term 'public body' and 'public officer' as enacted by s. 2 of the Act means:

> 'public body' includes:
>
> (a) the Government of Malaysia,
>
> (b) ...
>
> (c) any department, service or undertaking at the Government of Malaysia or a state;
>
> 'public officer' includes any person in the permanent or temporary employment of a public body.

The prosecution had adduced evidence, and the Sessions Court found proven, which decision is not disputed by the appellant, that Paramadas is a "public officer" within the meaning of s. 2 by reason of Paramadas serving in the Department of Inland Revenue at the material time.

It would appear that the learned Sessions Court Judge accepted the testimony of SP1, the proprietor of Evergreen Horticulture Nursery (whose application for registration with the Ministry of Finance formed the substance of the charge preferred) that a person named 'Das' solicited gratification of RM1,300 as an inducement or reward to expedite the issuance of the letter of approval of Evergreen's application. She also accepted SP3's evidence (the complainant in this case and the person authorised by SP1 to act on his behalf to effect the said payment of RM1,300 to 'Das'), that the 2nd accused called upon him, identified himself as 'Das' and subsequently made two further visits in respect of payment of the sum solicited.

From the evidence of SP3 and two officers from the Anti Corruption Agency i.e. SP5 and SP6, the learned Sessions Court Judge accepted, and found proved, that the gratification solicited had been paid and received by Paramadas. Paramadas was caught 'red handed' with the trap money in his wallet which notes had earlier that morning been handed over by SP14 to SP3.

Having found Paramadas to be a public officer, and payment given and received, the Sessions Court invoked the s. 14 presumption under the Prevention of Corruption Act 1961 which reads:

> Where in any proceedings against a person for an offence under s. 3 or 4 it is proved that any gratification has been paid or given to or received by a person in the employment of any public body, the gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned, unless the contrary is proved.

Counsel for the appellant argues besides proving Paramadas to be a public officer and payment paid and received by Paramadas there was yet another ingredient to be proved by the prosecution. According to him it was also essential for the prosecution to prove that Paramadas had the ability to perform the act represented as stipulated in the charge, i.e. to obtain the approval letter for registration of Evergreen with the Ministry of Finance, which ingredient, he submitted, had not been proven.

On this issue I take note of the decision of Shanker J. in *Public Prosecutor v. You Kong Lai* [1985] 1 MLJ 298. As to what is the proper construction to be given to s. 3(a) (ii) Prevention of Corruption Act, Shankar J. ruled:

> The presence of the word "solicit" in the section to my mind clearly shows that if a person invites the payment of monies so that he may allegedly use the same to bribe a member of a public body, he has already committed an offence. The fact that the corrupt purpose was not carried out does not matter.

In making the decision that he did Shankar J. took into consideration the following cases:

> The following cases appear to merit special attention. In *Indur Dayaldas v. State of Bombay* it was held that to constitute an offence under s. 161 it is not necessary that the act for doing which the bribe is given should actually be performed. It is sufficient if a representation is made, that the act has been performed or that it will be performed and a public servant who obtains a bribe by making such representation, will be guilty of the offence punishable under this section even if he had or has no intention to perform and has not performed or does not actually perform that act. A representation by a person that he has done or that he will do an act impliedly includes a representation that it was or is within his power to do that act. In other words the act is punishable corruption even if it amounted to cheating by false representation.
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> Section 161 is of course directed at public servants taking gratification whereas s. 3 of the Prevention of Corruption Act is not so limited.
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> In *Bhimrao Narasimha Hublikar v. Emperor* it was held that no favour need be shown to the briber as a fact. It was sufficient if he was led to believe that the matter would go against him if he did not give the bribe.

In *Chaube Dinkar Rao*, the Court was concerned with the effect of ss. 107 and 108 of the Penal Code which deal with abetment in conjunction with s. 161 of the Penal Code. The 2 accused persons were held liable as abettors of an offence under s. 161 with reference to giving a bribe to a Judge. The fact that judge had no guilty intention or knowledge was held to be immaterial. Explanation 2 to s. 108 shows that it is not necessary that the act abetted should be committed and Explanation 3 further states that it is not necessary that the person abetted should have any guilty knowledge or intention

...

...

In *Mahadeo Dannappan Gunaki v. State* at page 437 the learned Judge stated that:

> The *mens rea* consists in his intention to give a bribe in order that it may induce the public servant to do or not to do something which he would otherwise not do or do. This state of mind of the person, who offers a gratification, has obviously nothing to do with the question whether the public servant, to whom the gratification is offered, is or is not in a position to do or not to do the act, for doing or for not doing which the amount is offered to him.
>
> The Prevention of Corruption Act is a much wider statute than the provisions contained in ss. 161 - 165 of the Penal Code. Section 3 of the Act is not limited to public servants but applies to all persons. It applies equally to a person who receives the gratification on behalf of a public officer or for himself.

Shankar J. concluded, on the facts of that case:

> In this case, through the eyes of PW3 the intention obviously was to give a bribe for the renewal of the licence. Everything else being equal he fell within the four walls of s. 3(b) of the Act. The mens rea was there and the absence of any evidence that the D.O. was *particeps criminis* was irrelevant.

From the evidence of SP1 it is clear that the representation made by Paramadas, that he could perform the act represented, operated on SP1's mind. SP1 acted under the believe and on the strength of the representation made by Paramadas that he would influence the public officer responsible to approve and expedite the issuance of the letter of approval in respect of Evergreen's application for registration. The *modus operandi* clearly indicates that Paramadas was acting with the assistance of someone in the Ministry of Finance. Solicitation and payment being proved I hold that it is not necessary for the prosecution to prove that it was within the power of Das to do the act represented.

I will now consider the contentions of Counsel for the appellant that the learned Sessions Court Judge erred in admitting various evidence on the ground that it is inadmissible/prejudicial to the appellant and the issue of *'mens rea'* of the appellant.

On the acknowledgement by Paramadas on exhibit P6 that "all the serial numbers of the money in the list tally with the RM1,300 I received from one Mr. Kua", it was contended that this evidence was prejudicial and should not have been admitted. I am of the view that the learned Sessions Court Judge did not err in admitting exhibit P6 together with Paramadas' acknowledgement. The acknowledgement was relevant and material as corroborative evidence of the testimony of SP3, SP6 and SP7's evidence, that gratification was paid and received by Paramadas.

Counsel stressed that SP1 and SP3's evidence does not implicate the appellant. According to him the issuance of P8, the approval letter from the Ministry of Finance to Evergreen, by itself, does not show that the money received by Paramadas was for someone in the Ministry of

Finance. Even accepting that Paramadas received the money, Counsel argues, there was no evidence that the money was also for the appellant.

From the judgment of the learned Sessions Court Judge it would appear that although there was no direct evidence implicating the appellant, from the evidence adduced by the prosecution, she found sufficient circumstantial evidence connecting the appellant with Paramadas and the crime. It would appear that she relied on the following:

(a) The appellant's name and office telephone number in Paramadas' address book (exhibit P13 and P13A) which was recovered by the BPR officers from Paramadas immediately upon Paramadas' arrest at SP3's office;

(b) The subsequent identification by Paramadas to BPR officers of the appellant as the man named 'Khalid' in his address book, P13;

(c) The positive act of assistance by the appellant:

(i) in personally taking Evergreen's file to the typist for typing although the appellant was then no longer in charge of the said file;

(ii) after the letter had been typed, in signing the letter typed (exhibit P8), for and on behalf of the file officer, Azhar b. Ismail, without the file officer's knowledge or permission;

(d) The recovery of two other letters by BPR officers (exhibits P17 and P20) both dated 13 August 1988, also signed by the appellant, from a room occupied by Paramadas and from the drawer of the table occupied by Paramadas in his office at the Department of Inland Revenue, respectively.

The criticism levelled against the taking into consideration of the appellant's name in the address book was on the basis that the appellant was in no position to prevent anyone from inserting his name in any address book, and such evidence should not therefore be considered incriminating.

In determining this issue, I ask myself these questions. Why would Paramadas choose to insert a complete stranger's name into his address book? Why should Paramadas subsequently identify and implicate a complete stranger, as the man named in the address book, unless of course the man is known to him. I am of the view these evidence were certainly significant and the Sessions Court Judge was right in taking into consideration the appellant's name in Paramadas' address book and the subsequent identification of the appellant as the man named 'Khalid' by Paramadas into consideration.

I now turn to ground (c) on the admissibility of exhibits P17 and P20 (page 204 and 207 Appeal Record), i.e. letters from Ministry of Finance to Ferrovic Corp. (M) Sdn. Bhd. and Pengurus Mulpha Trading Sdn. Bhd. It is pertinent to note that P17 and P20 bore the same date ad P8, "13 February 1988" and also bore the same signature and signed for and on behalf of the same officer, Azhar Ismail. It was contended that those exhibits should not have been admitted as being prejudicial to the appellant, as it tends to show that the appellant has been guilty of criminal acts other than those covered by the charges, as infringing the similar fact rule.

On this issue I am of the opinion that consideration must not only be given to the similar fact rule in respect of its exclusionary part but also to its inclusionary part. As to its inclusionary part, evidence is admissible if it was relevant to an issue before the Court and it may be so relevant if it bears upon the question whether the acts alleged were designed or accidental or to rebut a defence which would otherwise be open to the accused or to support an identifi-

cation. In *Junaidi Bin Abdullah v. Public Prosecutor* [1993] 4 CLJ 201 the Supreme Court relied on the principle enunciated in *Makin v. Attorney General for New South Wales* [1894] AC 57 as applied locally in *G.F.L. Ewin v. Public Prosecutor* [1949] 15 MLJ 279 and *Public Prosecutor v. Ong Kok Tan* [1969] 1 MLJ 118. The Supreme Court also referred to the decision of the House of Lords in *Boardman v. Director of Public Prosecutions* [1974] 3 AER 887. The Supreme Court ruled:

> On the principle laid down in *Makin's* case and *Boardman's* case, we are of the opinion where the purpose of adducing evidence of similar facts or similar offences is justifiable on ground of relevancy and necessity to rebut any defence which otherwise be open to the accused (in addition to those under s. 14 and 15 of the Evidence Act) it is admissible in evidence provided the probative value of such evidence outweighs its prejudicial value.

In relation to the crime charged, I am of the opinion that the evidence of P17 and P20 being in the possession of Paramadas was vital to the prosecution and relevant under s. 11 of the Evidence Act. The evidence is relevant and probative as showing system, and to rebut a possible defence of innocent association as well as identification. I am of the view that the probative force is sufficiently great to make it just to admit the evidence. Its probative value outweighs its prejudicial value. Its existence throws light on the probabilities of the case and forms a further link in the chain of proof.

On the point that *mens rea* of the appellant has not been proven it has often been observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

In cases like this, where the evidence is circumstantial what has to be considered is to consider not only each individual piece of evidence but the combined strength of these strands when twisted together, whether the various circumstances to which they spoke pointed irresistably in one direction and one direction only, the direction being the appellant.

When the evidence of the prosecution is critically tested against the totality of the evidence and with the probabilities of the case, I hold that the learned Sessions Court Judge was right in concluding that there was circumstantial evidence of a cogent nature connecting the appellant with the crime. Common sense rules out the presence of the appellant's name in P13 as mere coincidence and the recovery of two other letters signed by the accused P17 and P20 provides a further link to the appellant's involvement. The appellant played his part by his involvement in causing the letter P8 to be expeditiously prepared and signing the same although the file was not within his portfolio. I hold the various circumstances to which they spoke pointed irresistably in one direction, and one direction only, being the guilt of the appellant.

On the attack of admissibility of statements made by Paramadas to the BPR officers by reason of the caution not being properly administered,it is clear from the evidence of SP6 that consequent upon arrest, he not only read the caution as provided for under s. 15 of the Prevention of Corruption Act but also explained the said caution to Paramadas and asked him whether he understood it, to which, Paramadas acknowledged that he did.

As to the complaint that the statements by Paramadas, in so far as it implicated the appellant, was hearsay and should not be admitted, I am of the view that the evidence could be admitted as to the conduct of Paramadas and not as to the truth of the statement. Whatever statements Paramadas made to SP6 and SP7 were admitted, not for the purpose of establishing the facts alleged but to show the state of mind and conduct of Paramadas and to draw inferences therefrom.

With regard to grounds (d) and (e) the contention that statements made by Paramadas were wrongly admitted in evidence as it constituted a confession by Paramadas, implicating the appellant, of which its voluntariness has not been proven, and that it has not been corroborated in material particular, I hold them to be of no merit and substance for the following reasons.

The meaning to be attributed to the word 'confession' was considered in *Anandagoda v. The Queen* [1962] 28 MLJ 289 where the Privy Council held that the correct meaning to be attributed to the word "confession" in s. 25 Evidence Act was that taken by Gavin A.C.J. in *The King v. Cooray* [1926] 27 NLR 74 at 79:

> The term "admission" is the genus of which "confession" is the species. It is not every statement which suggests any inference as to any fact in issue or relevant fact which is a confession, but only a statement, made by a person accused of an offence whereby he states that he committed that offence or which suggests not any inference but the inference that he committed that offence.
>
> The test whether a statement is a confession is an objective one, whether to the mind of a reasonable person reading the statement at the time and in the circumstances in which it was made it can be said to amount to a statement that the accused committed the offence or which suggested the inference that he committed the offence. The statement must be looked at as a whole and it must be considered on its own terms without reference to extrinsic facts.
>
> The appropriate test in deciding whether a particular statement is a confession is whether the words of admission in the context expressly or substantially admit guilt or do they taken together inferentially admit guilt?

SP7's testimony when Paramadas was questioned how he got P8, was as follows:

> Tentang surat daripada Kementerian Kewangan dia beritahu yang dia dapati surat daripada Encik Khalid yang bekerja di Bahagian Kontrak, Kementerian Kewangan. YT2 juga memberitahu kami yang wang RM1,300 itu adalah dimaksudkan untuk Encik Khalid dan Encik Khalid akan memberi RM100 atau RM200.

A reasonable person reading the statement would conclude that, far from admitting guilt, Das is denying liability of any wrong doing. Whilst admitting that he did receive the money, he is saying that he was only a collecting agent in respect of which he would receive some payment for the service that he rendered.

Applying the test referred to above I am of the opinion it cannot be concluded that the statement made by Paramadas amounts to a statement that Paramadas committed the offence or which suggests the inference that he committed the offence and falling within the meaning of the word "confession". In these circumstances I am of the view that the submission of Counsel as to the application of s. 30 Evidence Act to the Appellant is without merit and substance.

As to the submission of Counsel for the appellant that the learned Sessions Court Judge erred in accepting the uncorroborated evidence of Paramadas, a co-accused, it may be pertinent to note the decision of the Court of Appeal in *Daud bin Awang Ngah & Ors. v. Public Prosecutor* [1938] 24 MLJ 168. In that case the Court of Criminal Appeal relied on the judgment of the Singapore Court of Criminal Appeal in *Tan Cheng Seng & Anor. v. Rex.* [1948] MLJ 148 where it was held that a co-accused giving evidence on his own behalf against a co-accused was not to be regarded as an accomplice and therefore the rule regarding corroboration did not apply. They clearly laid down that the rule only applied to witnesses for the prosecution.

I have also considered ground (f) and consider the inconsistencies pointed out to be minor not affecting the value of the testimony of witnesses.

On an application of the maximum evaluation test as laid by *Khoo Hi Chiang v. Public Prosecutor* at the end of the prosecution case I hold that the learned Sessions Court Judge was right in holding that the prosecution had established the charge against the appellant beyond all reasonable doubt. The learned Sessions Court Judge was right in calling for defence.

The Defence

The only question left for me to consider is whether the defence put up by the appellant could reasonably be true. The learned Sessions Court Judge after carefully considering the defence of the appellant, for the reasons given in the judgement, held the explanation of the appellant to be not only improbable and unreasonable and inconsistent with innocence. The cogent evidence all points to the appellant as the officer in the Ministry of Finance with whom Paramadas was involved as a participant in the offence committed. The learned Sessions Court Judge rejected Paramadas' defence of being a mere innocent tool in the hands of the appellant, that he was merely used by the appellant to deliver the letter. I am perfectly satisfied that Paramadas had been rightly convicted. I see no reason at all to disagree with the learned Sessions Court Judge's findings.

Having considered the whole of the arguments put forward before me and the evidence on record which I have carefully reviewed, I hold that there is no merit whatsoever in the appeal against the conviction. As for the appeal against sentence I am of the view that the sentence of 10 months imprisonment and fine of RM7,000 imposed in default 6 months was appropriate and sufficiently deterrent to any public officer who would venture to obtain a bribe. The appeal against sentence is therefore also dismissed.